



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

AUG 17 2004

Uniform Issue List: 402.00-00

SE: T: EP: RA: T3

Legend:

Taxpayer A =

Amount D =

Amount E =

Amount F =

Company V =

Brokerage Firm M =

Broker T =

Plan X =

Dear _____

In letters dated February 7, 2004, and July 13, 2004, your authorized representative requested a waiver of the 60-day rollover requirement contained in section 402(c)(3)(A) of the Internal Revenue Code (the Code).

The following facts and representations have been submitted under penalty of perjury in support of the ruling requested:

Taxpayer A was an employee of Company V and participated in its retirement plan, Plan X. Company V filed for bankruptcy on about _____. After some time Taxpayer A found employment with a new employer. Taxpayer A hoped to roll over his Plan X distribution to an IRA in mid _____ but he received correspondence that the Bankruptcy Court had held up the Plan X distributions.

In early November, _____ Taxpayer A discovered a check in amount D which had been mailed from Broker T which held the assets of Plan X. The check was dated _____

Amount D represented the total amount due Taxpayer A from his Plan X account less Amount E which had been withheld for Federal Income taxes and had been remitted to the Internal Revenue Service. Taxpayer A represents that he does not know

who received the check or when it was received at his home. As soon as Taxpayer A became aware of the check, he had a Brokerage Firm M representative investigate whether it was possible to have the check returned to Broker T which would then void the check and issue a new one. He was advised that this was not possible. The check was never cashed by Taxpayer A.

Taxpayer A promptly took the pension distribution to Brokerage Firm M where he was advised to add Amount E, which had been withheld by Broker T for taxes and place the balance, Amount F, into an IRA rollover account. Amount F was deposited in an IRA with Brokerage Firm M on 1/1/04.

Taxpayer A had received, during calendar years 2001 through 2003, numerous pieces of correspondence from either Company V or the Bankruptcy Court relating to the Company V's bankruptcy, COBRA coverage, and other related issues. Included in this correspondence was a letter dated 1/1/04 which, in relevant part, advised Taxpayer A that the Plan X administrator would advise him as to when he could expect to receive amounts due him under Plan X. However, Taxpayer A never received any such correspondence. Thus, Taxpayer A was not expecting any check in 2004. Furthermore, Taxpayer A never received any correspondence advising him of any rollover rights that might attach to any distribution from Plan X. Finally, as noted above, the individual who received the check did not advise Taxpayer A of its receipt.

Based on the facts and representations, you request that the Service waive the 60-day rollover requirement with respect to the distribution of Amount F because the failure to waive such requirement would be a hardship and against equity or good conscience.

With respect to your request to waive to 60 day rollover requirement, section 402(a)(1) of the Code provides that, except as otherwise provided in section 402, any amount distributed out of an employees' trust described in section 401(a) that is exempt from tax under section 501(a) shall be taxable to the distributee, in the taxable year of the distributee in which distributed, in the manner provided under section 72 of the Code (relating to annuities).

Section 402(c) of the Code provides rules governing rollovers of amounts from exempt trusts to eligible retirement plans including IRAs.

Section 401(a)(31)(A) of the Code provides that a trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution-

- (i) elects to have such distribution paid directly to an eligible retirement plan, and
- (ii) specifies the eligible retirement plan to which such distribution is to be paid (in such

form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Section 401(a)(31)(E) of the Code provides that, for purposes of Code section 401(a)(31), the term "eligible retirement plan" has the meaning given such term by section 402(c)(8)(B) with an exception not pertinent to this ruling request. Thus, a direct transfer defined in Code section 401(a)(31), may be made into an IRA.

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer-5, provides, in relevant part, that a direct rollover described in Code section 401(a)(31) is a distribution and rollover of the eligible rollover distribution and not a transfer of assets and liabilities. Thus, for example, the consent and requirements of Code sections 401(a)(11), 411(a)(11), and 417 apply to transactions described in Code section 401(a)(31).

Code section 402(c)(3)(A) provides that, except as provided in subparagraph (B), paragraph (1) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.

Section 402(c)(3)(B) of the Code provides that the Secretary may waive the 60-day requirement under section 402(c)(3)(A) of the Code where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement. Only distributions that occurred after December 31, 2001, are eligible for the waiver under section 402(c)(3)(B) of the Code.

Revenue Procedure 2003-16, 2003-4 I.R.B. 359 (January 27, 2003), provides that in determining whether to grant a waiver of the 60-day rollover requirement pursuant to section 402(c)(3)(B), the Service will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution; (2) inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country or postal error, (3) the use of the amount distributed (for example, in the case of payment by check, whether the check was cashed); and (4) the time elapsed since the distribution occurred.

The information provided on behalf of Taxpayer A demonstrates a failure on his part to timely accomplish a rollover of Amount F distributed from Plan X primarily because the distribution of Amount D and the corresponding withholding of Amount E occurred without his knowledge. Taxpayer A was not aware that the check, in the amount of Amount D, had been received until a date in early which date was beyond the requisite 60 day rollover period. Furthermore, Taxpayer A's failure to notice the check was a result of both his not being informed of its receipt by the person who received the check and his not expecting the check due, to a

great extent, to his having received numerous pieces of correspondence from either Company V or the Bankruptcy Court, many of which pertained to subjects not relevant either to his loss of employment or his retirement. Finally, Taxpayer A did not cash the check and rolled over Amount F, which consisted of both Amount D and Amount E, into an IRA shortly after discovering the check.

Thus, based on the above, pursuant to Code § 402(c)(3)(B), the Service hereby waives the 60-day rollover period found in Code § 402(c)(3)(A). As a result, the Service will treat Taxpayer A's November, 2002 rollover contribution of Amount F into an IRA set up and maintained in his name with Brokerage Firm M as a valid rollover within the meaning of Code § 402(c).

No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations which may be applicable thereto.

This letter is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

If you wish to inquire about this ruling, please contact _____, I.D. # _____, at _____ . Please address all correspondence to SE:T:EP:RA:T3.

A copy of this letter has been sent to your authorized representative in accordance with a Power of Attorney on file in this office.

Sincerely yours,


Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:
Deleted copy of letter ruling
Notice of Intention to Disclose